

CITIES AND TOWNS - Interplay between county and city residents concerning citizen initiatives;

COUNTIES - Interplay between county and city residents concerning citizen initiatives;

COUNTY GOVERNMENT - Interplay between county and city residents concerning citizen initiatives;

ELECTIONS - Scope of “qualified voters” for county zoning regulation initiatives affecting all unincorporated areas of the county;

INITIATIVE AND REFERENDUM - Scope of “qualified voters” for county zoning regulation initiatives affecting all unincorporated areas of the county;

LAND USE - Scope of “qualified voters” for county zoning regulation initiatives affecting all unincorporated areas of the county;

LOCAL GOVERNMENT - Interplay between county and city residents concerning citizen initiatives;

MUNICIPAL GOVERNMENT - Interplay between county and city residents concerning citizen initiatives;

ZONING AND PLANNING - Scope of “qualified voters” for county zoning regulation initiatives affecting all unincorporated areas of the county;

MONTANA CODE ANNOTATED - Sections 1-1-215, 1-2-101, 7-1-2104, 7-3-111, -421(3), 7-5-131, (1), (2), -132 through -137, -132(3)(d), -134(1), -2101, 7-14-2507, 76-1-601, -604(4), 76-2-101, (5), -201, -202(1)(a), -205, (6), -206, -310, 76-15-207, 85-7-1710;

MONTANA CONSTITUTION - Article IV, section 2; article XI, sections 1, 8;

OPINIONS OF THE ATTORNEY GENERAL - 49 Op. Att’y Gen. No. 11 (2001).

HELD:           The “qualified voters” for Ravalli County zoning regulation initiatives, effective in all unincorporated areas of Ravalli County, are all residents of the County, including those residing within incorporated areas such as the City of Hamilton.

June 23, 2008

Mr. Kenneth S. Bell  
Hamilton City Attorney  
P.O. Box 210  
Hamilton, MT 59840-0210

Dear Mr. Bell:

[P1] You have requested my opinion as to the following question [which I have rephrased as]:

Which body of “electors” constitutes the “qualified voters” for Ravalli County zoning regulation [initiatives effective in all unincorporated areas of Ravalli County]--the residents of the unincorporated areas only, or all of the residents of the County, including those residing within incorporated areas such as the City of Hamilton?

[P2] The Ravalli County Board of County Commissioners (the Board), in April of 2006, enacted Resolution 1844 which limited the size of “large scale retail sales and retail services establishments to no more than 60,000 square feet.” The zoned area included “all of the unincorporated area of Ravalli County, Montana.” The resolution was an “interim zoning resolution” passed by the Board on an emergency basis pursuant to Mont. Code Ann. § 76-2-206.

[P3] Later that year, two citizen-sponsored zoning initiatives were proposed by residents of Ravalli County. The first initiative sought to repeal Resolution 1844. The second initiative sought adoption of an interim zoning regulation limiting subdivision density to one residence per two acres for all unincorporated areas of Ravalli County. During the signature gathering process for these initiatives, the county attorney was asked whether the only acceptable signatures for the petition to put the zoning initiatives on the ballot were those of voters residing in unincorporated areas of the county. The county attorney agreed that the only acceptable signatures were those of voters in the unincorporated areas.

[P4] The proponents gathered sufficient signatures and the initiatives were put on the ballot for the November 2006 election. Only voters residing in unincorporated areas of Ravalli County were allowed to vote on the initiatives. After the election, several voters, including many in the City of Hamilton, questioned why city residents (i.e., incorporated voters) were not allowed to vote on the county initiatives. The county attorney then provided you, Mr. Bell, as Hamilton City Attorney, with a copy of his previous opinion and supporting research.

[P5] The City of Hamilton disagreed with the county attorney’s opinion, instead concluding that all county residents have a right to vote on county zoning initiatives, including voters residing in incorporated areas. You have now requested my opinion

regarding which body of “electors” constitute “qualified voters” for county zoning initiatives.

[P6] The Montana Constitution directs the legislature to “extend the initiative and referendum powers reserved to the people by the constitution to the *qualified electors of each local government unit*.” Mont. Const. art. XI, § 8. “Qualified elector” is defined in the constitution as “Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law . . . .” Mont. Const. art. IV, § 2. “Local government unit” is also defined in the constitution as including, but not limited to, “counties and incorporated cities and towns.” Mont. Const. art. XI, § 1.

[P7] The legislature, following the language of the constitution, has provided this initiative and referendum power to the “electors of each local government” via Mont. Code Ann. § 7-5-131, et seq. Citizen initiatives are limited to actions within the legislative power of the local government, as stated in Mont. Code Ann. § 7-5-131(1):

Resolutions and ordinances within the legislative jurisdiction and power of the governing body of the local government, except those set out in subsection (2), may be proposed or amended and prior resolutions and ordinances may be repealed in the manner provided in 7-5-132 through 7-5-137.

[P8] The initiative petition must “contain the signatures of 15% of the registered *electors of the local government*.” Mont. Code Ann. § 7-5-132(3)(d) (emphasis added). The number of “electors” from which this percentage is calculated “shall be the number of individuals registered to vote *at the preceding general election for the local government*.” Mont. Code Ann. § 7-5-134(1) (emphasis added).

[P9] Together, these provisions lead to the conclusion that the “qualified voters” for county-wide zoning initiatives include all county residents otherwise eligible to vote, including those residing in incorporated areas. The applicable local government unit here is Ravalli County. Counties are specifically denominated under the constitutional definition of “local government unit.” Mont. Const. art. XI, § 1. The applicable “qualified elector” or “qualified voter” then, is “any citizen . . . who meets the registration and [county] residence requirements.” Mont. Const. art. IV, § 2. A “county resident” is one who lives within the borders of the county, regardless of whether he is in an incorporated or unincorporated area of the county. See Mont. Code Ann. § 1-1-215 (defining “residence” as a person’s permanent home). The citizen initiative power is thus reserved for voters in both incorporated and unincorporated areas of the county.

[P10] This conclusion--that all county residents constitute “qualified voters” for county initiatives--is further supported by the fact that the number of petition signatures necessary to place an initiative on the ballot is calculated from the “individuals registered to vote at the preceding general election for the local government.” Mont. Code Ann. § 7-5-134(1). The “local government” or “governing body” (see Mont. Code Ann. § 7-5-131(1)) of a county is the board of county commissioners. Mont. Code Ann. §§ 7-1-2104, 7-5-2101 (stating that a county’s power “can only be exercised by the board of county commissioners” and that the board represents and manages the county). In Montana counties, all residents who are qualified to vote elect the board, including those residing in incorporated areas. Because the valid signatures for an initiative petition are those of all county residents, the “qualified voters” for the subsequent vote on the initiative are logically also all county residents. In general, then, all county residents may vote on county initiatives and these initiatives may address anything “within the legislative jurisdiction and power” of the board of county commissioners.

[P11] Ravalli County, however, argues that, at least for an initiative proposing or repealing zoning regulations, “qualified voters” are limited to residents of those areas covered by the zoning. The county notes that citizen initiatives are limited to actions “within the legislative jurisdiction and power of the governing body of the local government.” Mont. Code Ann. § 7-5-131(1). The county’s authority to enact zoning regulation is generally limited to unincorporated areas of the county. Mont. Code Ann. § 76-2-202(1)(a). Similarly, a city’s authority to zone is generally limited to its incorporated area. Mont. Code Ann. § 76-2-310. The county thus concludes that, because a city cannot regulate outside its boundaries, “voters in [cities] likewise cannot regulate zoning in those areas through the power of initiative and referendum.”

[P12] The Montana Supreme Court has considered the validity of a citizen initiative seeking to overturn a city zoning regulation. The Court held that a zoning regulation, unlike a special improvement district (SID), is subject to citizen initiative. The Greens at Fort Missoula v. City of Missoula, 271 Mont. 398, 405, 897 P.2d 1078, 1082 (1995). The Court specifically distinguished City of Shelby v. Sandholm, 208 Mont. 77, 676 P.2d 178, where the Court determined that the voters of an entire city “could not vote on the propriety of one SID because the entire city was not physically and financially affected by that SID.” The Greens, 271 Mont. at 404-05, 897 P.2d at 1081-82. The city zoning regulation, in contrast, could affect “the entire community” by way of additional “financial, social, and environmental” pressures. Id. Thus, the community as a whole was affected, even though most city residences did not abut the property in question. Id. Because the zoning ordinance was within the “legislative jurisdiction and power” of the city government, the entire city electorate was entitled to subject the ordinance to “a referendum vote in order to repeal the ordinance.”

[P13] While specifically addressing city zoning, not county zoning, the reasoning of The Greens is applicable to the issue at hand. Here, the entire “electorate of Ravalli County,” including incorporated voters, is entitled to vote on county zoning initiatives because such regulation is within the “legislative jurisdiction and power” of the county government, i.e. the board. Even though the zoning regulations only directly affect unincorporated areas, the entire county could be affected by way of additional “financial, social, and environmental” pressures. In fact, these very pressures were cited by both the board and the citizens as part of the reason that “emergency” zoning regulations were needed. Thus, even though the incorporated voters of Ravalli County could not effectuate zoning regulations in unincorporated areas via their *city government*, they are entitled to vote on zoning initiatives within the power of the *county government* because they elect the board and because they could be affected by the zoning regulations.

[P14] Ravalli County also points out that the “qualified voters” for citizen initiatives seeking to adopt, revise or reject a “growth policy,” within the meaning of Mont. Code Ann. § 76-1-601, et seq., are limited to “qualified electors of the area covered by the growth policy.” Specifically, the growth policy statutes limit the applicable petition signatures necessary to place a growth policy initiative on the ballot to “the qualified electors of the area covered by the growth policy.” Mont. Code Ann. § 76-1-604(4).

[P15] Ravalli County is correct that, in contrast to the inclusive nature of the general initiative provisions, the legislature has chosen to limit the “qualified electors” for purposes of a citizen initiative seeking to change a “growth policy” to those voters within the area of the growth policy. However, the provision authorizing and explaining county zoning is in a different part of the code, Mont. Code Ann. § 76-2-201, et seq., from the part dealing with growth policies. The part dealing with county zoning does not have a parallel section limiting “qualified electors” to those voters living in the area affected by the zoning regulation. In fact, the section does not even mention citizen initiatives.

[P16] “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted or omit what has been inserted.*” Mont. Code Ann. § 1-2-101 (emphasis added). Here, the legislature has not limited the initiative process for county zoning regulations in the way it has for growth policies. And, the existence of other instances in which the legislature has specifically limited the voting privilege on geographic grounds would suggest that the legislature was well aware of how to craft language creating such limitation, and chose not to in this instance. See, e.g., 49 Op. Att’y Gen. No. 11 (2001) (discussing geographic limits on eligibility of voters with respect to extra-territorial application of city building codes). Therefore, the general, inclusive provisions of Mont. Code Ann. § 7-5-131, et seq., control. The “qualified electors,” or “qualified voters,” for

purposes of citizen initiatives seeking to repeal, amend, or propose county zoning regulation are all county citizens, including voters in incorporated cities and towns.

**[P17]** Nevertheless, Ravalli County and the Montana Association of Counties (MACo) contend this construction contradicts a clear legislative scheme. They point out that those who may “protest” the establishment of a specified zoning “district” is limited to those who own property (“freeholders”) in the proposed “district.” See Mont. Code Ann. §§ 76-2-101(5) and -205(6). This opinion, however, does not address the qualified voters for a citizen initiative affecting a “zoning district” as defined in Mont. Code Ann. §§ 76-2-101 and -205. Instead, this opinion is limited to considering the qualified voters for two interim zoning regulation initiatives effective in all unincorporated areas of the county.

**[P18]** Ravalli County also points out that, in addition to the “growth policy” initiative limitation already mentioned, the Legislature has expressly limited the “qualified electors” for several other land use regulations. See, e.g., Mont. Code Ann. § 7-14-2507 (qualified electors for a vote to exceed levy authority must reside or own property in the district); Mont. Code Ann. § 76-15-207 (“qualified electors” for conservation district referenda are electors within the boundaries of the territory); Mont. Code Ann. § 85-7-1710 (irrigation district electors are those residing in the irrigation district). Ravalli County concludes these specific limitations evidence a “legislative pattern” limiting those who may vote on land use regulations to persons residing in the affected area. However, these specific limitations also show that the Legislature is capable of limiting qualified voters when it sees fit. As noted above, it has not limited the qualified voters for county-wide zoning regulation initiatives in the way it has limited qualified voters for these other specific areas. Whether the Legislature *should* limit qualified voters for county-wide zoning initiatives in a similar manner is, of course, a question more properly directed to the Legislature.

**[P19]** Finally, Ravalli County claims that this construction will eliminate the jurisdictional distinctions between municipal and county zoning and give city residents a “double vote.” This opinion in no way alters the jurisdiction of city or county zoning. A county zoning initiative, like any other initiative, is limited to the “jurisdiction and power of the local government,” here the board of county commissioners. Ravalli County does not contend that the zoning regulations at issue are beyond the jurisdiction of the board. The system of local government set up by the legislature and the constitution dictates this result. Residents of an incorporated area are residents of, and pay taxes in, the particular city as well as the county. Just as county citizens in unincorporated areas are also entitled to vote in state and federal elections, county voters within incorporated areas are entitled to vote in city, county, state and federal elections.

Mr. Kenneth S. Bell  
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THEREFORE, IT IS MY OPINION:

The “qualified voters” for Ravalli County zoning regulation initiatives, effective in all unincorporated areas of Ravalli County, are all residents of the County, including those residing within incorporated areas such as the City of Hamilton.

Very truly yours,

MIKE McGRATH  
Attorney General

mm/jss/jym